

Cutler v AB Stable LLC

2023 NY Slip Op 31581(U)

May 10, 2023

Supreme Court, New York County

Docket Number: Index No. 595300/2022

Judge: Frank P. Nervo

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANK P. NERVO PART 04

Justice

-----X

KEVIN CUTLER,

Plaintiff,

- v -

AB STABLE LLC, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK D/B/A AECOM TISHMAN, ALLAN BRITEWAY ELECTRICAL UTILITY CONTRACTORS, INC.,

Defendant.

-----X

AB STABLE LLC, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK D/B/A AECOM TISHMAN

Plaintiff,

-against-

ALLAN BRITEWAY ELECTRICAL UTILITY CONTRACTORS, INC.

Defendant.

-----X

INDEX NO. 156743/2021

MOTION DATE 03/09/2023

MOTION SEQ. NO. 001

**DECISION + ORDER
ON MOTION**

Third-Party
Index No. 595300/2022

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for DISCOVERY.

Plaintiff moves to compel defendants AB Stable and Tishman Construction to provide supplemental responses to plaintiff's demands. The motion is unopposed, and no other party has appeared on this motion.

CPLR § 3101(a) directs that there "shall be full disclosure of all matter material and necessary to the prosecution or defense of an action, regardless of

the burden of proof” (*Forman v. Henkin*, 30 NY3d 656, 661 [2018]). The test utilized is “one of usefulness and reason” (*id.*). CPLR § 3124 provides that a party seeking disclosure may move to compel compliance or a response if the responding party fails to respond or comply with a proper request, notice, interrogatory demand or question pursuant to Article 31 of the CPLR.

The material sought by plaintiff was, in part, the subject of a prior order of the Court, which directed, inter alia, defendants to disclose insurance information to plaintiff (*see* Preliminary Conference Order). Notwithstanding that plaintiff moves to compel discovery under CPLR § 3124, “upon learning that a party has repeatedly failed to comply with discovery orders, [trial courts] have an affirmative obligation to take such additional steps as are necessary to ensure future compliance” (*Figdor v. City of New York*, 33 AD3d 560, 561 [1st Dept 2006]). Consequently, in consideration of defendants’ failure to: comply with Court order directing disclosure of discovery; return phone calls of plaintiff’s counsel seeking to obtain court-ordered discovery as required by Uniform Rules § 202.20-f; respond to plaintiff’s demands; provide complete responses in compliance with the Uniform Rules; and appear on this motion regarding defendants’ aforementioned failures, the Court deems it necessary to convert the motion seeking to compel under CPLR § 3124 to a motion seeking to strike a pleading for willful and contumacious non-compliance under CPLR § 3126. The Appellate Division, First Department has repeatedly held “[a] party that permits discovery to ‘trickl[e] in [with a] cavalier attitude should not escape adverse consequence” (*Henderson-Jones v. City of New York*, 87 AD3d 498, 504 [1st Dept 2011] quoting *Figdor v. City of New York*, 33 AD3d 560, 561 [1st Dept 2006]).

CPLR § 3126 subsection three provides that the Court may strike a pleading when it finds, inter alia, that a party has refused to obey an order for disclosure or willfully fails to disclose information that ought to have been disclosed. This remedy is drastic and should only be imposed when the movant has “clearly shown that its opponent’s nondisclosure was willful, contumacious or due to bad faith” (*Commerce ∅ Indus. Ins. Co. v. Lib-Com Ltd.*, 266 AD2d 142 [1st Dept 1999]). A pattern of default, lateness, and failure to comply with court orders can give rise to an inference of willful and contumacious conduct (see *Merchants T ∅ F, Inc. v. Kase ∅ Druker*, 19 AD3d 134 [1st Dept 2005]); see also *Shah v. Oral Cancer Prevention Intl., Inc.*, 138 AD3d 722 [2d Dept 2016]).

As the Court of Appeals has repeatedly underscored, “our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice. The failure to comply with deadlines not only impairs the efficient functioning of the courts and adjudication of claims, but it places jurists unnecessarily in the position of having to order enforcement remedies to respond to the delinquent conducts of members of the bar, often to the detriment of the litigants they represent. Chronic noncompliance with deadlines breeds disrespect for the dictates of the Civil Practice law and Rules and a culture in which cases can linger for years without resolution” (*Gibbs v. St. Barnabas Hosp.*, 16 NY3d 74 [2010]). Compliance requires a timely response and good faith effort to provide a meaningful response (*Kihl v. Pfeffer*, 94 NY2d 118, 123 [1999]). Disregard of discovery deadlines will not be tolerated (*Andrea v. Arnone, Hedin, Casker, Kennedy ∅ Drake, Architects ∅ Landscape Architects, P.C.*, 5 NY3d 514, 521 [2005]; see also *Arpino v. F.J.F. ∅ Sons Elec. Co., Inc.*, 102 AD3d 201, 208 [2d Dept 2012]).

Here, it is beyond cavil that the Court's limited resources should not be utilized repeatedly directing defendants to disclose the most routine of discovery, nor should plaintiff's counsel's resources be directed to months-long attempts to obtain that discovery which this Court has ordered be disclosed. Indeed, there can be no argument that the material sought by plaintiff is material and necessary in this action, and defendants' failure to appear on the motion amounts to, at minimum, a tacit acknowledgement of same. The inference of willful and contumacious non-compliance is inescapable here where defendants' have failed to: comply with Court order directing disclosure of discovery; return phone calls of plaintiff's counsel seeking to obtain court-ordered discovery as required by Uniform Rules § 202.20-f; respond to plaintiff's demands; provide complete responses in compliance with the Uniform Rules; appear on this motion regarding defendants' aforementioned failures. The failure to appear on a discovery motion supports a finding of willful and contumacious conduct (*Figiel v. Met Food*, 48 AD3d 330 [1st Dept 2008]).

Indeed, this Court has sanctioned counsel for failing to appear on a discovery motion, as same necessarily squanders the Court's time addressing unopposed and inarguably proper discovery – definitively frivolous conduct under 22 NYCRR § 130. However, in the Court's discretion it will not, at this time, direct counsel to show cause why sanctions should not be imposed for frivolity.

[continued on following page]

Accordingly, it is

ORDERED that the motion is granted and the pleadings of defendants AB Stable LLC and Tishman Construction Corporation of New York d/b/a AECOM Tishman shall be stricken unless they provide the discovery sought in this motion; and it is further

ORDERED that defendants, having failed to appear on this application, have waived any objection to the relief granted herein; and it is further

ORDERED that within 10 days, plaintiff shall submit order setting forth the discovery sought in this application, consistent with this decision; and it is further

ORDERED that the failure to timely submit order, via NYSCEF with courtesy copy to chambers, within 10 days, as above, shall constitute waiver of the relief granted herein.

THIS CONSTITUTES THE DECISION OF THE COURT.

5/10/2023
DATE


HON. FRANK P. NERVO
J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE